IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 05-CV-00329-GKF-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE TO "JOINDER BY TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC. AND COBB-VANTRESS, INC. IN THE CARGILL DEFENDANTS' MOTION TO MODIFY THE SCHEDULING ORDER"

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and responds to the Tyson Defendants' Joinder in the Cargill Defendants' Motion for Modification of Scheduling Order [DKT #1299] as follows:

1. The State adopts and incorporates by reference the arguments set forth and scheduling order proposal made in its "Response to the Cargill Defendants' Motion for Modification of Scheduling Order" [DKT #1322].

2. As explained in that brief, the Scheduling Order should be modified, but not for the reasons advanced by the Cargill Defendants and not in the manner proposed by the Cargill Defendants.

3. Nor should it be modified for the reasons advanced by the Tyson Defendants in their joinder.

4. Each of the four reasons advanced by the Tyson Defendants in their joinder lacks merit. Simply reiterating unfounded allegations does not make them true.

5. As to the Tyson Defendants' assertion that "Plaintiffs' [sic] *modus operandi* in terms of discovery is obvious -- delay production as long as possible and produce responsive information only after a motion to compel is filed or in some instances only after being expressly ordered to do so by the Court," it is incorrect. The State, as shown in its Response to the Cargill Motion, has made extraordinary efforts to provide Defendants, including the Tyson Defendants, all of the information to which they are rightfully entitled in a timely manner. In contrast to the Tyson Defendants, *see, infra,* ¶6(d), the State has been conscientious and thorough in producing both hard copy documents and ESI materials that are responsive to the discovery requests directed at it. To date the State has produced more than one million pages of hard-copy documents and more than 175 gigabytes of ESI materials that are responsive to the far-reaching requests of Defendants. Further, the State's production of hard-copy documents and ESI materials has been completed or will be completed shortly. Simply put, the State's actions in discovery have not been directed at delay and have not prejudiced the Tyson Defendants in their trial preparation.

6. As to the Tyson Defendants' second assertion -- that the State has engaged in "file dumps" -- this too is incorrect.

a. While it has indeed produced a massive amount of information to Defendants, including the Tyson Defendants, in response to their broad discovery requests, the State has not merely "dumped" these documents. Numerous attorneys and dozens of agency employees have spent thousands of hours identifying, reviewing and producing hard copy documents and ESI materials responsive to Defendants' requests. In making its productions, the

State has complied not only with the requirements of the Federal Rules but also with the dictates of the Court's orders. The State has produced, and is producing, comprehensive indices in connection with its hard copy productions, and searchable native format ESI in connection with its ESI production. Use of these indices and appropriate search terms provides the Tyson Defendants the ready ability to identify those materials contained in the production that are responsive to their discovery requests. These are therefore plainly not "file dumps." Thus, the State has complied with its discovery obligations.

b. Further, while the Tyson Defendants serve up platitudes about each "defendant's individual, and often unique defenses," the fact of the matter is that there is nothing "individual" or "unique" about the Tyson Defendants' defenses. *See, e.g.,* Tyson Defendants' Answer to State's Second Amended Complaint [DKT #1238] (Affirmative Defense No. 52: "The Tyson Defendants hereby adopt and incorporate by reference any other statement of defense asserted by any other Defendant in this action"). Moreover, assertions by the Tyson Defendants that they "have pursued targeted discovery on specific subjects" ring hollow when one considers (1) that the Tyson Defendants are part of a joint defense in this action, and (2) the breadth of the actual discovery requests served. The simple fact of the matter is that Defendants are well-aware of the allegations against them and the facts that support those allegations. These facts, which center on the improper handling of poultry waste, are similar from Defendant to Defendant. The injury caused by Defendants' conduct is indivisible. It should therefore come as little surprise to Defendants that there is going to be substantial overlap in the information responsive to the various Defendants' discovery requests.

c. As noted above, the Tyson Defendants have the information responsive to their discovery requests. The information is searchable with indices (hard copy materials) or by

search terms (ESI materials). However, the Tyson Defendants apparently seem unwilling to review this information. So, instead of focusing on the core issues of the case, the Tyson Defendants have chosen to embark on a course of bringing motions to compel that nit pick around the edges of the State's discovery responses.

d. Meanwhile, the Tyson Defendants refuse to disclose to the State even the most fundamental information about this case, some of which was requested as early as April 2006. For example, the State is still seeking from the Tyson Defendants such basic information as the amount of feed consumed by their birds raised in the Illinois River Watershed on an annual basis, the number of birds raised by them in the Illinois River Watershed on an annual basis, and the amount of waste generated by those birds on an annual basis. That the Tyson Defendants have still failed to disclose information such as this to the State is inexplicable, and has severely prejudiced the State in its trial preparation.

7. The Tyson Defendants' third assertion -- that the State refuses to commit to a completion date for its documents production -- is also incorrect. As set forth in the State's Response to the Cargill Motion and below, the State has provided completion dates for its productions:[1]

Agency	Hard Copy Production[2]	ESI Production
Oklahoma Department of Environmental Quality	Completed	Completed

[1] The State will, of course, supplement its agency productions listed below if additional responsive information is subsequently identified. Further, the State is continuing to investigate and determine the ability to restore certain deleted e-mails from certain of the agencies and will meet-and-confer with Defendants when the State has completed its investigation.

[2] Included within the term "Hard Copy Production" is the production of documents that have been imaged and produced on disk.

Oklahoma Water Resources Board	Completed	Completed; One database being made available for inspection on-site
Oklahoma Conservation Commission	Completed	Completed; One database and non-e-mail ESI being made available for inspection on-site
Oklahoma Scenic Rivers Commission	Completed	Completed
Office of the Secretary of the Environment	Completed	Completed
Oklahoma Department of Agriculture, Food and Forestry	Scheduled to be completed by Oct. 26, 2007	Scheduled to be completed by Dec. 1, 2007
Oklahoma Department of Wildlife Conservation	Scheduled to be completed by Oct. 15, 2007	Scheduled to be completed by Oct. 15, 2007
Oklahoma Department of Tourism	Completed	Completed
Oklahoma Department of Mines	Scheduled to be completed by Dec. 1, 2007	Scheduled to be completed by Dec. 1, 2007
Oklahoma Department of Health	Scheduled to be completed by Dec. 1, 2007	Scheduled to be completed by Dec. 1, 2007
Oklahoma Corporation Commission	Completed	Completed

8. The Tyson Defendants' fourth assertion -- that the State's production of sampling data remains incomplete -- is without foundation. The State has been conscientiously producing its sampling data to Defendants as it becomes available to the State's experts (*i.e.*, once QA / QC protocols have been completed).[3] To date there have been at least seven productions comprising some 100,000 pages of information. That the Tyson Defendants "never anticipated that the process of actually completing production [of the sampling data] would extend over so many months" reflects a willful ignorance of the fact that the State's sampling efforts have spanned many months, are on-going and, accordingly, not all the information from its sampling efforts is available at the same time. *See* Exhibit 1 (Sept. 19, 2007 letter from L. Bullock to R. George:

[3] Once it completed development of a method for using DNA to track bacteria from poultry waste, the State began production of that data in September, 2007.

"While it is true that there have been repeated supplements of our initial production, this is because as new data has been developed, it has been produced. It is our intent to continue to produce the data as it becomes available from our scientists until all of the data is produced. Frankly, I do not understand your complaint that it is prejudicial to the Defendants for us to provide you the data at the point where it completes our internal QA/QC review. It is only at that point that the data becomes available to our scientists and eligible for inclusion in their analysis. The suggestion that Defendants are prejudiced unless they get data before Plaintiff's own scientists is absurd"). To the extent that the Tyson Defendants complain that they have not received the State's work product analysis and related materials associated with this data, the fact is that the Tyson Defendants are not entitled to this information under the Rules and Scheduling Order. The Tyson Defendants are not, and have not been, prejudiced by the State's production of its sampling data. It is been produced timely and in an organized fashion. *See* Exhibit 1. The Tyson Defendants have for many months now had the ability to analyze this data against the allegations contained in the State's lawsuit.[4]

9. In sum, nothing in the Tyson Defendants' joinder supports the modification of the Scheduling Order being proposed by the Cargill Defendants (and embraced by the Tyson Defendants).

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[4] The Tyson Defendants make the statement that "Plaintiffs' [sic] testing or sampling may reveal conditions which need to be investigated or explained by the Tyson Defendants through additional targeted sampling or testing." To date, despite having had access to the State's available data for a number of months now, it is the State's understanding that the Tyson Defendants have not undertaken any such additional sampling or testing. (The Tyson Defendants are under a continuing obligation to provide such data to the State, and beyond the data pertaining to the split field samples they have not produced any.) This fact undercuts this assertion being made by the Tyson Defendants.

WHEREFORE, premises considered, this Court should deny the modification requested by the Cargill Defendants in their Motion for Modification of Scheduling Order [DKT #1297] and joined by the Tyson Defendants [DKT #1299], and instead enter the modified Scheduling Order proposed by the State in its "Response to the Cargill Defendants' Motion for Modification of Scheduling Order" [DKT #1322].

Respectfully Submitted,

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I hereby certify that on this 15th day of October, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

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